United States v. *Bass*, 536 U.S. 862 (2002) (per curiam); *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-490 (1999); *Armstrong*, *supra*; *Wayte*, *supra*. In a selective prosecution case, there must be both a subjective showing that the decision to prosecute was motivated by a discriminatory purpose and an objective showing that similarly situated members of a different class were not prosecuted. *Armstrong*, 517 U.S. at 465. Since this Court's decisions make clear that a claimant cannot establish selective prosecution merely by showing that his race was the but-for cause of the prosecution, *ibid.*, petitioners are mistaken in their contention (Pet. 15-16) that a claimant *can* establish *retaliatory* prosecution merely by showing that his *speech* was the but-for cause of the prosecution. These similar types of constitutionally prohibited prosecutions should be treated similarly.

Contrary to petitioners' contention, a claim of retaliatory prosecution requires an objective showing, and that showing is an absence of probable cause for the charges. Retaliatory prosecution is a form of malicious prosecution (the malicious purpose being retaliation for the defendant's speech), and the absence of probable cause is an essential element of a claim of malicious prosecution. That was the common law rule when the First Amendment was adopted, see, *e.g.*, *Wheeler* v. *Nesbitt*, 65 U.S. (24 How.) 544, 550-551 (1861) (citing cases); 3 William Blackstone, *Commentaries* 127 (1768), and it remains the common law rule today, see, *e.g.*, Restatement (Second) of Torts § 653, at 406 (1977); 8 Stuart M. Speiser et al., *The American Law of Torts* § 28:7, at 38 (1991). Because the "particular concern" about the "systemic costs" of judicial inquiry necessitates an objective element for a claim that a prosecution was moti-

vated by a constitutionally prohibited factor, *Wayte*, 470 U.S. at 607, and because this Court routinely consults the common law in attempting to determine the content of constitutional provisions, a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges.

Petitioners rely (Pet. 15-17) on this Court's decisions in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), but those cases are inapposite. *Mount Healthy* did not involve retaliatory *prosecution*. Like the other decisions in the line of cases beginning with *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), *Mount Healthy* involved retaliatory action against an *employee* by a public *employer*, and thus the special considerations governing constitutional challenges to prosecutorial decisionmaking were inapplicable. As for *Crawford-El*, that case rejected "special procedural rules" for "constitutional claim[s] that require[] proof of improper motive," 523 U.S. at 577, and also rejected a "proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent," *id.* at 594. This case does not implicate an across-the-board rule of procedure or immunity for claims requiring proof of improper motive. Rather, the rule applied by the court of appeals is that, in the unique context of prosecutorial decisionmaking (which was not at issue in *Crawford-El*), a substantive claim of retaliation in violation of the First Amendment will not lie if the charges were supported by probable cause.

2. In agreement with the court below, four other circuits have held that the absence of probable cause is

an element of a claim of retaliatory prosecution.[3] Three circuits have reached the opposite conclusion.[4] In *Hartman* v. *Moore*, No. 04-1495, this Court granted certiorari to resolve the conflict. 125 S. Ct. 2977 (2005). There is no need for the Court to grant certiorari in this case as well, or even to hold the petition pending the decision in *Hartman*, because Izen would not be entitled to relief even if this Court decided that probable cause does not defeat a claim of retaliatory prosecution.

A government official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Accordingly, even if respondent "violated a constitutional right," he is still entitled to qualified immunity if "the right was [not] clearly established." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). The constitutional right at issue here—the right to be free from a prosecution supported by probable cause that was motivated by the defendant's speech—was not clearly established when the criminal charges were filed

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[3] See *Draper* v. *Reynolds*, 369 F.3d 1270, 1277 n.11 (11th Cir.), cert. denied, 125 S. Ct. 507 (2004); *Wood* v. *Kesler*, 323 F.3d 872, 883 (11th Cir.), cert. denied, 540 U.S. 879 (2003); *Dahl* v. *Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002); *Curley* v. *Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); *Smithson* v. *Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000); *Merkle* v. *Upper Dublin Sch. Dist.*, 211 F.3d 782, 796 (3d Cir. 2000); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); *Mozzochi* v. *Borden*, 959 F.2d 1174, 1179-1180 (2d Cir. 1992).

[4] See *Moore* v. *Hartman*, 388 F.3d 871, 877-881 (D.C. Cir. 2004), cert. granted, 125 S. Ct. 2977 (2005); *Greene* v. *Barber*, 310 F.3d 889, 896-897 (6th Cir. 2002); *Poole* v. *County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

against Izen. If anything, the law at that time was to the contrary.

By 1995, when the grand jury returned the indictment, the Fifth Circuit had already held that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must establish "all of the elements of the common law tort" of malicious prosecution, *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (1994), one of which is an absence of probable cause. Similarly, the Second Circuit had held that "[a]n individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government." *Mozzochi* v. *Borden*, 959 F.2d 1174, 1180 (1992). Both of those decisions were relied upon by the Fifth Circuit in the decision below. Pet. App. 7a-8a. In contrast, no court of appeals squarely held that probable cause does *not* defeat a claim of retaliatory prosecution until 2001—six years after petitioner was indicted. See note 4, *supra*.

Nor is this Court's decision in *Hartman* likely to shed any additional light on the question whether the right at issue was clearly established in 1995. The petition in *Hartman* did raise the question whether, if law enforcement officers may be liable for retaliatory prosecution when there was probable cause for the charges, the law to that effect was clearly established in 1988, when the charges in that case were filed. 04-1495 Pet. (I). But the Court did not grant certiorari on that question. 125 S. Ct. 2977 (2005).[5]

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[5] The fact that petitioners also raise a claim of retaliatory *investigation* (Pet. 17-18) is not a reason to hold the petition for *Hartman*, because no such claim is raised in that case. There is also no reason for the Court to grant plenary review on the issue. First, as in

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decision in *Hartman* v. *Moore*, No. 04-1495, and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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SEPTEMBER 2005

Hartman, the question presented in the petition in this case is whether the absence of probable cause is an element of a claim of retaliatory *prosecution*, Pet. i, and the issue of retaliatory *investigation* is not "fairly included therein," Sup. Ct. R. 14.1(a). Second, the court of appeals did not separately address a claim of retaliatory investigation, and petitioners cite no precedents from any court that has. (The only case cited by petitioners on that question is the initial decision of the court below, see Pet. 17-18, which was vacated when the court issued the decision of which petitioner seeks review.) Third, Izen's retaliatory-investigation claim is without merit. Since an investigation, unlike a prosecution, does not require probable cause, see, *e.g.*, *United States* v. *Powell*, 379 U.S. 48, 57 (1964), a claim of retaliatory investigation, if such a claim exists at all, should require *more* than a claim of retaliatory prosecution, not less, as petitioners suggest (Pet. 18). At a minimum, petitioners cannot show that Izen had a *clearly established* right to be free from an investigation, supported by evidence of wrongdoing, that was allegedly motivated by his speech.

Supreme Court, U.S.
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(4)

No. 05-64

IN THE

Supreme Court of the United States

JOE ALFRED IZEN, JR. AND KAREN SUTER IZEN,

Petitioners,

v.

TERRANCE CATALINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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September 2005

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REPLY BRIEF FOR PETITIONER

Respondent acknowledges that there is a circuit conflict on the question presented in this case. *See* Br. in Opp. 6, 8-9. Indeed, Respondent concedes that this case "presents the same question" as *Hartman* v. *Moore*, cert. granted, No. 04-1495 (June 27, 2005). Respondent nevertheless contends that the petition should be denied or, "[i]n the alternative," held pending the Court's decision in *Hartman*. Br. in Opp. 11. Respondent contends that denial is appropriate because he "is entitled to qualified immunity regardless of whether the absence of probable cause is an element of a claim of retaliatory prosecution." Br. in Opp. 6. This is not so. Respondent may not be entitled to qualified immunity, and therefore the Court should, at a minimum, hold the petition pending the decision in *Hartman*. Alternatively, the Court may wish to grant the petition and consider this case together with *Hartman*.

1. Respondent's sole argument for denial of the petition is that he is entitled to qualified immunity regardless of this Court's resolution of the question presented by the petitions in this case and in *Hartman*. That argument is incorrect for several reasons.

First, Respondent fails to inform the Court that the Fifth Circuit's initial decision in this case unanimously *rejected* his qualified immunity claim. The court of appeals stated: "It has long been the law of this circuit that government officials violate the First Amendment by undertaking a prosecution 'in retaliation for or to deter the exercise of constitutionally protected rights.'" Pet. App. 24a (quoting *Wilson* v. *Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979)). Accordingly, the court of appeals concluded: "A reasonable agent would not have believed it permissible to investigate and prosecute an attorney in order to discourage him from opposing the IRS." *Id.* at 24a. In its opinion on rehearing, the court of

appeals found that it did not need to reach the qualified immunity question. *Id.* at 11a n.9. Thus, the only Fifth Circuit decision in this case that addressed the qualified immunity issue held that Respondent is *not* entitled to qualified immunity. If this Court were to affirm the D.C. Circuit's decision in *Hartman*, the Fifth Circuit is likely to reinstate its unanimous ruling on qualified immunity.[1]

Second, even if the Fifth Circuit had not provided direct evidence that it is likely to reject Respondent's qualified immunity claim, that court should be allowed to decide the issue in the first instance. If this Court affirms the D.C. Circuit's decision in *Hartman*, the district court's ruling that Respondent is entitled to qualified immunity will be left as the sole basis for the district court's judgment in this case. Petitioner should not be foreclosed from obtaining appellate review of the qualified immunity issue.

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[1] Respondent contends that when Petitioner was indicted in 1995, the Fifth Circuit had already "held that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must establish 'all the elements of the common law tort' of malicious prosecution." Br. in Opp. 10 (quoting *Johnson* v. *Louisiana Dep't of Agric.*, 18 F.3d 318, 320 (5th Cir. 1994). Respondent's investigation of Petitioner began in 1990, before the Fifth Circuit's decision in *Johnson*. *See* Pet. 3. Moreover, the Fifth Circuit's initial opinion in this case cited *Johnson*, and noted that "the government need not have even reasonable suspicion to undertake an investigation," but held that "this is beside the point." Pet. App. 18a-19a. The Fifth Circuit explained that Petitioner's "claim, properly understood, is not that [Respondent] violated the First Amendment by undertaking an investigation without reasonable suspicion, but rather that he violated the First Amendment when he undertook an investigation with the substantial motivation of retaliating against [Petitioner] for his advocacy on behalf of unpopular criminal tax defendants." *Id.*

Third, this Court has already declined the government's invitation to decide the qualified immunity issue. In *Hartman*, the D.C. Circuit—like the Fifth Circuit in its initial opinion in this case—rejected the defendant's qualified immunity argument. *Moore* v. *Hartman*, 388 F.3d 871, 885 (D.C. Cir. 2005). The government sought certiorari on both the qualified immunity issue and the First Amendment retaliation issue, but the Court granted review only on the First Amendment issue. *See Hartman*, 125 S. Ct. 2977 (2005) (limiting the grant of certiorari to the first question presented). Having declined to decide the qualified immunity issue in *Hartman*, the Court should not undertake to effectively decide that issue in this case.[2]

Fourth, Respondent is incorrect in asserting (Br. in Opp. 10) that the Court's decision in *Hartman* cannot have any bearing on the qualified immunity issue in this case. In *Hartman*, the government argues that the standard for proving governmental retaliation in violation of the First Amendment is more stringent when retaliation takes the form of a criminal prosecution than when it takes some other form, such as an adverse employment decision. *Id.* at 8. If the Court concludes that the standard it established in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), applies to retaliatory prosecution claims, its reasoning will have implications for the qualified

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[2] The D.C. Circuit's rejection of the defendant's qualified immunity defense in *Hartman* further undermines Respondent's contention that he is undoubtedly entitled to qualified immunity in this case. Respondent contends (Br. in Opp. 10) that he is entitled to qualified immunity because Petitioner was indicted in 1995, prior to the first court of appeals decision squarely holding that probable cause does not defeat a claim of retaliatory prosecution. The charges in *Hartman* were filed even earlier, in 1988. *See id.*

immunity question. Indeed, the Fifth Circuit's initial decision in this case rejected Respondent's qualified immunity claim under reasoning based on *Mount Healthy* and cited *Mount Healthy* in support of its ruling. *See* Pet. App. 24a ("If substantially motivated by a desire to retaliate against Izen for his association with and representation of tax defendants . . . Catalina's actions were not objectively reasonable."); *id.* at 19a n.7 (citing *Mount Healthy*).

2. The Court may wish to grant the petition because, unlike *Hartman*, this case presents the First Amendment issue in the context of a retaliatory investigation as well as a retaliatory prosecution. As noted above, Respondent's argument is based on a purported distinction between retaliatory prosecutions and other government actions that are concededly subject to the *Mount Healthy* standard. Br. in Opp. 6-8. Consideration of the criminal investigation context may help the Court explore where the constitutional lines should be drawn. In particular, as Respondent correctly notes, an investigation does not require probable cause. Br. in Opp. 11 n.5 (citing *United States* v. *Powell*, 379 U.S. 48, 57 (1964)). It follows that absence of probable cause cannot be an element of a retaliatory investigation claim. The government nevertheless argues that retaliatory investigations should be exempt from the *Mount Healthy* standard, and should require an even stricter standard of proof than the one it advocates for retaliatory prosecution claims. Indeed, the government makes the surprising suggestion that a claim of retaliatory criminal investigation in retaliation for the exercise of rights protected by the First Amendment may not "exist[] at all."[3] Br. in Opp. at 11 n.5.

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[3] *Hartman* will be argued at the earliest during the Court's January Session. If the Court is inclined to grant the petition (...continued)

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition in this case should be held pending the Court's decision in No. 04-1495, *Hartman* v. *Moore*.

Respectfully submitted,

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in this case, Petitioner has no objection to expediting the briefing schedule so that the oral argument in this case can be heard at the same time as the oral argument in *Hartman*.